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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 935.

PAUL CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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STATEMENT OF CASE.

On the morning of June 6, 1964, the manager of the All-Gas Products Company of Barberton, Ohio, discovered that his place of business had been broken into, and merchandise stolen. Invoices were scattered over the floor and display articles were missing. The glass in a rear window was broken and pieces of glass were scattered on the floor. He immediately reported this to the Barberton Police.

On that same morning, June 6, 1964, detectives of the Akron, Ohio, Police Department received a telephone call that a man was attempting to sell some grinder equipment in a suspicious manner at Joe's All Star Cafe in Akron, Ohio. When investigating detectives arrived at the cafe, they found a man, later identified as the defendant, Paul Clark, at the bar with an abrasive grinder. Testimony by

police and at least one of defendant's witnesses indicated that the defendant, Paul Clark, was at the bar and that he attempted to sell the grinder to one of the Akron detectives who was in plain clothes. (R. 81, R. 128, R. 133.) Further testimony indicated that the defendant had been drinking alcoholic beverages.

When one of the detectives asked Clark whether he had more equipment to sell, defendant Clark voluntarily took him to his car in the parking lot and there displayed the rest of the equipment, which was located in the back seat and trunk of Clark's auto. There is testimony that Clark voluntarily opened the car door and trunk. (R. 84.)

The detectives, after considering the defendant's suspicious manner in attempting to sell the grinder at a very reduced price in the bar and after viewing the equipment in the car which Clark voluntarily showed to the detectives, placed the defendant in custody, seized the questioned equipment which they reasonably believed to be stolen, and took the defendant Clark, along with another man they found sleeping in the front seat of the car, to the Akron Police Station for investigation and questioning. This was approximately 9:30 a.m. on that morning.

Upon arriving at the police station, according to defendant's own testimony, the police prior to questioning him, allowed the defendant to sleep off the effects of his drinking. Defendant Clark testified that he slept till noon. (R. 156.) The detectives began questioning the two men at various times that late morning and early afternoon. Various witnesses testified that the defendant made certain oral statements which were in substance that after the bars closed the prior night, he, Paul Clark, and another unarmed man probably went to Barberton and broke into a place. The defendant denied making such oral statements when he took the stand in his own defense.

Among the various items which were found in the defendant's possession were some cigars which were imprinted, "All Gas." The Akron Police located a company by that name in Barberton, Ohio, and upon checking with the Barberton Police, learned that the All Gas Products Company had been burglarized the prior night. The management were called to the Akron Police Station where they identified the various items found in defendant's possession as those articles stolen from their company. Based upon this information, the police charged the defendant with being a suspicious person under a municipal ordinance, Section 1179.01, Akron City Code, pending further investigation and identification of a good footprint which was found on one of the scattered invoices discovered on the floor of the burglarized building. The footprint was later identified by an expert witness to have been made by the shoe the defendant had been wearing at the time he was arrested.

Petitioner was thereafter indicted on December 18, 1964; he obtained an attorney and he was released on bond to await trial. Clark entered a plea of "not guilty" at arraignment on January 15, 1965, and the journal entry of that date recites Attorney Patrick Simon of Akron, Ohio, as attorney of record for Clark.

The case was set for trial May 26, 1965. The day prior to trial, Attorney Simon approached the Court and represented that the defendant had no funds with which to pay counsel and he asked the Court to appoint him. The Court acceded to his request and appointed him officially that day. Later that day, Mr. Simon again approached the Court and indicated that he would like to have associate counsel appointed as chief counsel, and that he be permitted to withdraw as chief counsel. The Court generously granted this request and appointed Mr. Simon's recom-

mendation, Mr. Harold Binns of Akron, Ohio, only after Mr. Binns indicated that he was prepared to go forward with trial as scheduled. (R. 3-5.)

That same afternoon, the State of Ohio turned over its entire file to Mr. Binns which included the most damaging report of the State's expert witness who positively identified the defendant's shoe as making the footprint that was found in the burglarized building.

The trial commenced on the afternoon of May 26, 1965. The defendant was represented by privately retained counsel for more than five months prior to trial. This same counsel was appointed when it was determined defendant couldn't pay him and this same counsel sat at the trial table during the trial. (R. 5, 6.)

Immediately prior to opening statements after impanelling of a jury, defense counsel, Attorneys Harold Binns and Patrick Simon, indicated concern that they had been unable to locate some witnesses for the defense and for this reason requested a continuance. The Court denied the request, and ordered subpoenas for the witnesses who were later found, and did testify at trial. (R. 3-5.)

During the trial, the Court permitted certain testimony concerning statements made by petitioner while in the custody of police. The owner of the business was permitted to testify to certain statements made in his presence by the petitioner. (R. 36.) Counsel for petitioner objected not to the statement but to the owner testifying as to what the police observed. (R. 36-37.)

The Court permitted a Barberton police officer to testify that petitioner stated, "It looks like you got me." It is true that counsel objected to this, but on specific grounds that such was improper direct testimony in that he was giving an impression. The police officer further testified that petitioner stated, "Well, I probably did it but I can't recall it because I have been drinking so much."

There was no objection to this nor to the testimony by the Akron Police officer as enumerated on page eight of the petitioner's brief.

When evidence in the nature of a photograph of the seized items was introduced, counsel objected on the specific ground that the picture was not the best evidence and at no time during the course of the trial was there any objection based upon an alleged illegal search and seizure. (R. 96.)

Defense counsel moved for a directed verdict at the end of the State's case and stated the specific grounds for such directed verdict on the State's alleged failure to prove the specific elements of the crime, specifically: venue, night season, and intent. The motion for a directed verdict was overruled, and the defendant failed again to present such at the end of the defendant's case. The case went to the jury and said jury returned a verdict of guilty to each count of the indictment.

REASONS IN OPPOSITION TO GRANTING THE WRIT.

I.

There is no doubt that an accused in a criminal case is entitled to have counsel and there is no doubt, in the case at bar, that the defendant Clark did, in fact, have counsel. The issue raised by the appellant in reason number one for granting a writ of certiorari appears to be that the defendant's case suffered from lack of pre-trial preparation and denial of effective assistance of counsel.

The cases cited by the appellant as authority for his position may be distinguished from the instant case. In *Powell vs. Alabama,* 287 U. S. 45 (1932), where the three negroes were accused of raping two white girls, the trial court, in a most casual fashion, waited until the very morning of the trial to appoint an attorney.

The appellant, in the present case, was arraigned on January 15, 1965, and counsel was appointed on that day. The appellant retained counsel from this date through his trial on May 26, 1965.

In *Williams vs. Kaiser,* 323 U. S. 471 (1945), cited on page 11 of appellant's brief, the defendant requested counsel, none was appointed and he pleaded guilty to armed robbery which was a capital offense in Missouri. In *Von Moltke vs. Gillies,* 332 U. S. 708 (1948), the defendant purportedly waived her right to be represented by counsel and pleaded guilty to conspiring to violate the Espionage Act, a capital offense. It appeared that this defendant, who was indigent and was not provided with an attorney, had entered her plea in reliance upon incorrect advice given to her by an F. B. I. lawyer-agent and it appeared to the court that she had not intelligently and understandingly waived her right to counsel.

In *Reece vs. Georgia,* 350 U. S. 85 (1955), Reece, a Negro, was convicted of the rape of a white woman in Cobb County, Georgia, where a Georgia rule of practice required him to challenge the composition of the grand jury before indictment. Attorneys were appointed after indictment and attempted to quash the indictment. The trial court held that such motion to quash was not timely made.

In the case of *Hawk vs. Olson,* 326 U. S. 271 (1945), the defendant was charged with murder, and the court had begun to seat a jury for purposes of trial, over the objection of the defendant who had requested a continuance for the purpose of consulting with counsel. At this point, two members of the office of Public Defender entered the case without ever having consulted with the defendant.

The facts in this case presently before the court, do not show that the defendant was denied the appointment of counsel as in *Williams;* was not coerced or misled into waiving his right to an attorney as in *Von Moltke;* was not precluded, by a rule of court, subsequent to appointment of counsel from raising any issue concerning the legality of the proceedings prior to the appointment, as in *Reece,* and was not appointed counsel for the very first time after three members of the jury had already been called, as in *Hawk.*

We join with the appellant in looking to the case of *Joseph vs. United States,* 375 U. S. 977 (1964), for an answer to the issues raised herein. In this case the appellant was indicted on April 13, 1961, at which time he requested a week's continuance for the purpose of securing counsel. On April 24, 1961, he pleaded not guilty with counsel and trial was set for May 2, 1961. He moved for a continuance on April 24, 1961, which was denied. The case involved six counts of violating the U. S. Narcotics law. The court, citing from the case of *Ray v. United States* (8th Cir. 1952), 197 F. 2d 268, at page 271, stated, "Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of material witnesses." The court held that the defendant had not been denied the effective assistaince of counsel.

This was also true in the case of *Avery v. Alabama* (1940), 308 U. S. 444, where the Supreme Court affirmed a death sentence where the attorneys had three days to prepare the defense.

In the case at bar, the defendant had over four months to prepare for trial and a new counsel was appointed for defendant the day before trial only on the basis that he

would be prepared to go forward the next day. To aid him in this preparation, he had the assistance of defendant's previous counsel, who had been on the case for four months, who sat with him during the course of trial. He also had the complete file of the prosecutor's office which had been turned over to him the day before trial.

We draw the court's attention to the fact that no continuance was asked for the purposes of preparing for trial but was made for securing witnesses which witnesses were subpoenaed and appeared for the defense. The appellant's position under reason one is not well taken.

II.

It is submitted that certain oral statements made by appellant, Paul Clark, to police officers were not a confession and the admission of such statements did not violate appellant's constitutional rights.

When Paul Clark was questioned he made numerous conflicting oral statements as to how he obtained the articles found in his possession. When he was confronted with cigars imprinted "All-Gas," he stated that he and another man probably went out to Barberton and broke into a place.

Appellant urges that this case falls within the doctrine set down in *Escobedo v. Illinois,* 378 U. S. 478, 4 Ohio Misc. 197. Appellee submits it does not.

At the outset of this argument appellee submits that the new doctrine concerning admissibility of confessions which was recently enumerated by the U. S. Supreme Court in *Miranda v. Arizona,* 34 LW 4521 does not apply to the case now before the Court.

The Supreme Court in *Johnson v. New Jersey,* 34 LW 4592 when called upon to determine whether *Escobedo*

v. Illinois, 378 U. S. 478 (1964) and *Miranda vs. Arizona,* 34 LW 4521 should be applied retroactively held that "*Escobedo* affects only those cases in which trial began after June 22, 1964, the date of that decision." The Court further held "that *Miranda* applies only to cases in which trial began after the date of our decision one week ago" (June 13, 1966). This case at bar went to trial May, 1965, and would fall under *Escobedo* if applicable.

Appellant urges that the *Escobedo* rule should be interpreted to conclude that an accused must be affirmatively advised of his right to remain silent and is entitled to assistance of counsel at the time of interrogation. *Miranda* is interpreted to so hold, but *Escobedo* cannot be. It is significant that the Supreme Court in *Johnson, supra,* restated the precise holding of *Escobedo* when it stated:

> "Apart from its broad implications, the precise holding of *Escobedo* was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,
>
> > '(where) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent * * *' 378 U. S., at 490-491.
>
> Because *Escobedo* is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which *Escobedo* was decided.
>
> As for the standards laid down one week ago in *Miranda,* if we were persuaded that they had been

fully anticipated by the holding in *Escobedo,* we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines already clearly foreshadowed. The disagreements among other courts concerning the implications of *Escobedo,** however, have impelled us to lay down *additional guidelines* for situations not presented by that case. This we have done in *Miranda, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966.* (Emphasis added.)

* For example, compare *People v. Dorado* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), and *People v. Dufour* __ R. I.__, 206 A. 2d 82 (1965), which construe Escobedo broadly with *People v. Hartgraves,* 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), and *Browne v. State,* 24 Wis. 2d 491, 131 N. W. 2d 196 (1964)."

It is evident that *Escobedo* is something less than *Miranda* and applies only to those circumstances where defendant requested counsel and was denied. The additional guidelines established by the *Miranda* case are not available to this appellant.

It is the duty of any court who is interpreting and applying the rule in *Escobedo* not to ascribe more to that opinion than was intended by its author. Mr. Justice Goldberg immediately defines the question that will be answered in the ensuing opinion when at page 478 he states:

"The critical question in this case is whether, *under the circumstances the refusal* by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of the 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made

> obligatory upon the States by the Fourteenth Amendment,' *Gideon vs. Wainwright,* 372 U. S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." (Emphasis added.)

By using the words "under the circumstances" we are immediately put on notice that the court here is not considering the right to counsel to be an absolute right. If it were absolute the only issue would be whether or not the defendant had an attorney and the "totality of circumstances" rule would not apply. The issue here is even more narrowly defined and limited to that situation where defendant's request to consult an attorney has been denied.

This decision, in its simplest terms, bars the use in evidence of a statement taken from a man under arrest and held in custody as a suspect for a particular crime while he was denied his request to consult with his lawyer and, at the same time, not effectively warned of his right to remain silent!

It is submitted that *Escobedo* is not applicable in the instant case. In the case at bar our attention is drawn immediately to the fact that upon the trial of this case there was no objection made, nor preserved in the record, to the admission into evidence of statements made by Defendant to the police.

The statements were made voluntarily and there is no issue raised on this question. The burden is upon the defendant to show that his constitutional rights to be represented by counsel and privilege against self-incrimination were violated and not upon the state to show whether they had or had not violated them once it was admitted that the statement was voluntary.

The Bill of Exceptions does not reflect the fact that the investigation had reached the accusatory stage and

there was no testimony by the defendant to the effect that he had requested counsel and his request had been denied. This was the only issue raised by *Escobedo* and without that question being present in the case at bar the *Escobedo* case has no application.

The rule in the case of *Escobedo* does not apply to the present case on its facts alone and, if it were held to apply, then appellant's right to invoke its principles were waived by defendant by their failure to make any objection to the introduction of the disputed testimony.

III.

Evidence from state's witnesses and at least one of Petitioner's witnesses indicated that the Petitioner, Paul Clark, was in Joe's All Star Cafe at the bar attempting to sell an abrasive grinder at a price much below its value when detectives entered the place. Detective Louthan testified that he asked the Petitioner, who he identified in the Courtroom, how much he wanted for the grinder and after Clark gave him his price he asked Clark whether he had more equipment for sale (R. 83). Petitioner answered in the affirmative and took Louthan and his companion to his car in the parking lot adjacent to the bar.

Louthan testified that he looked into the car and there viewed various pieces of equipment openly displayed in the back seat. He stated that he also observed a man sleeping on the front seat who was later identified as Cliff Fortune and who testified in Petitioner's behalf at trial. Clark was asked whether he had anything else and at this time Petitioner voluntarily opened the trunk of his car and showed his wares. Petitioner testified on direct examination (R. 162) that there was no question that the items were in his car but that when he opened the trunk he was surprised to find the equipment.

The detectives identified themselves and inquired of petitioner, how he came by this equipment. Petitioner gave evasive answers. Cliff Fortune was awakened and also asked. He also gave evasive answers. (R. 85.)

The detectives considered the petitioner's suspicious manner in the bar. They considered what they had seen in open view in the back seat of the trunk which petitioner voluntarily opened. They further considered petitioner's evasive answers. Detective Louthan has 23 years of experience as a police officer and a detective. Based upon this and what he had personally observed of Petitioner's conduct, he arrested Petitioner at this time, and immediately thereafter seized the equipment. There was never a search but only a seizure after arrest. There was no need for a search.

The State of Ohio requires that an issue must be raised at the first opportunity. In *State v. Davis,* 1 Ohio St. 2d 28 (1964), paragraph 1 of the syllabus states:

> "1. Where there has been an illegal search and seizure of evidence tending to incriminate an accused and such accused and his counsel know about such search and seizure in ample time to prepare and file a pre-trial motion to suppress such evidence, a failure to do so will amount to a waiver by the accused of his right to object to admission of that evidence against him."

The rationale behind this rule is that objection to the introduction of evidence at trial raises no question other than the competency, relevancy, and materiality of the evidence tendered. Accordingly, any collateral questions as how the evidence was obtained should not be raised during trial, but should be raised by pretrial motion, and failure to file a timely motion to suppress constitutes a waiver of that right. The *Davis* rule was recently applied in *State v. Woodwards,* 6 Ohio St. 2d 14 (1966).

This Court in footnote 9 to *Mapp v. Ohio*, 367 U. S. 643, 659 (1961) recognized the undoubted right of the states to adopt reasonable state procedural rules.

It should be noted that petitioner and his counsel had knowledge that evidence was seized by police. Petitioner failed to file a motion to suppress evidence prior to trial, and in fact, never even objected to admission into evidence of testimony concerning the stolen articles. An objection was made to the introduction of a picture of the stolen item but specifically on the grounds that the picture was not the best evidence. The search and seizure issue was not raised until the appellate level. It is therefore submitted that any question on the admissibility of evidence based upon a claimed illegal search and seizure must be timely made as soon as reasonably proper. Petitioner's failure to raise this issue prior to trial or even during trial constitutes a waiver of the right.

Further, should this Court not consider such a waiver, it is respectfully submitted that in fact there was never a search made. Police officers need not blindfold themselves in properly performing their duties. In *Smith v. U. S.*, 2 F. 2d 715, the Court held that consent is not necessary for an officer to seize evidence in a vehicle which is open and visible to the eye, either by daylight or by shining a light into such vehicle. So also *Ellison v. U. S.*, 206 F. 476.

The officer did view the abrasive grinder in the bar, did view various other items open to view in the back seat of petitioner's car, and did view additional items of equipment in the trunk which petitioner voluntarily opened. No force was ever used.

The question then becomes, was the seizure of the stolen goods incident to a lawful arrest?

The question here involves a consideration of Section 2935.04, Ohio Revised Code, as follows:

> "When a felony has been committed, or there is reasonable grounds to believe a felony has been committed, any person without a warrant, may arrest another whom he has reasonable cause to believe is guilty of an offense, and detain him until a warrant can be obtained."

The question then is, did the police officers have probable cause to arrest the petitioner? In *Brinegar v. United States,* 338 U. S. 160, this Court held that "in dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act."

Probable cause exists where "the facts and circumstances within the arresting officers' knowledge of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense had been committed." *Carol v. United States,* 367 U. S. 132, at 162. See also *Husty v. U. S.,* 282 U. S. 694; *Drumba v. U. S.,* 268 U. S. at 441.

Further guidelines was set by this Court in *Beck v. Ohio,* 379 U. S. 89:

> "Whether an arrest is constitutionally valid depends on whether, at the moment an arrest is made, the officers have probable cause to make it—whether, at that moment the facts and circumstances within their knowledge and of which they had trustworthy information are sufficient to warrant a prudent man in believing the Petitioner had committed * * * an offense."

Police officers, in the instant case, had sufficient facts within their knowledge to arrest the defendant without a warrant based upon probable cause to believe the petitioner had committed a felony. The officers viewed the petitioner in the bar, trying to sell the grinder at a greatly

reduced price. His conduct was suspicious. The officers viewed the grinder in the bar; they viewed various articles of equipment in the back seat of petitioner's car. They observed the additional items in the trunk of petitioner's car which Clark exposed to them, and they took note of Clark's evasive answers to questions about where he got the equipment. Based upon all this and their twenty years of experience as police officers, they lawfully arrested the petitioner and any seizure incident thereto was proper.

Petitioner cites *Preston v. U. S.*, 376 U. S. 364 (1964) as authority for their position. This case is not applicable to the instant case since in *Preston* the petitioner was arrested, taken to the police station and then officers later returned to the scene and searched the car. That court held that the search was too remote in time. In the instant case, there was no search, and the seizure was immediately incident to the lawful arrest.

The petitioner alleges that the detectives in the instant case used subterfuge and deception to gain the consent of petitioner to the alleged search and seizure citing *Gatewood v. United States,* 209 F. 2d 789 (D. C. Cir. 1953), as authority. In *Gatewood,* the petitioner was already in custody, a police officer went to her home and stated to the party within that he was a messenger of Western Union Telegraph Company, and as soon as the door was partly opened the police forcibly broke into the apartment.

In the instant case, no affirmative statement was made to petitioner to deceive him. No force of any kind was ever used. Detectives only made reasonable inquiries of the petitioner in a very discreet manner during the course of their investigation. At this time, there was no reason to identify themselves or to arrest the petitioner. Only

after investigating was there reasonable grounds to believe a felony had been committed by the petitioner.

Petitioner argues that police waited twelve weeks before a felony warrant was issued and this therefore will invalidate the original arrest. Respondent submits that this is not true. At time of arrest, the officer must only have probable cause to believe a felony had been committed. When he has such, the arrest is valid and any seizure incident thereto is proper. In the instant case police investigation of the case continued. Police processed the footprint found in the burglarized building, with the shoe that the defendant was wearing at time of arrest and they were able to positively match the two. Petitioner was given every possible doubt before his case was taken to the grand jury. Substantial justice was done herein.

For these reasons, respondent urges that pictures of the stolen goods were properly admitted into evidence.

CONCLUSION.

For the foregoing reasons, this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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